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In the

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1155~~ 64

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from
The Fifth Supreme Judicial District of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant United Artists Corporation (hereinafter referred to as United Artists) appeals from the final judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas entered on April 5, 1966,[1] and with respect to which the Supreme Court of Texas denied United Artists' Application for Writ of Error,

[1] Said judgment is also the subject of a pending appeal to this Court in No. 1109, Interstate Circuit, Inc. v. City of Dallas, filed March 3, 1967.

no reversible error, on July 27, 1966, an action made final by the overruling of Motions for Rehearing on October 19, 1966. Said judgment affirmed the trial court's temporary injunction prohibiting exhibition or advertisement of United Artists' feature motion picture "VIVA MARIA" within the city limits of the City of Dallas, except as "not suitable for young persons," as that term is hereinafter defined. United Artists submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of Judge A. R. Stout of the 40th Judicial District Court of Texas, sitting for the Judge of the 44th Judicial District is not reported. A copy of his oral opinion is annexed hereto as Appendix B, infra, p. App. B-1. The two concurring opinions of the said Court of Civil Appeals are reported at 402 S.W. 2d 770. A copy of each opinion is annexed hereto as Appendix C, infra, p. App. C-1. When denying United Artists' Application for Writ of Error, the Supreme Court of Texas announced no opinion.

JURISDICTION

Following said final judgement of said Court of Civil Appeals, United Artists timely filed an Application for Writ of Error in the Supreme Court of Texas. Following refusal of said Application by the Supreme Court of Texas, no reversible error, on July 27, 1966, United Artists filed

a timely Motion for Rehearing which was denied by the Supreme Court of Texas on October 19, 1966. (Appendix D, infra, p. App. D-2) From such denial, no further review or appeal was available to United Artists in the state courts of Texas and accordingly its Notice of Appeal to this Court was filed in the said Court of Civil Appeals, the court possessed of the record, on January 16, 1967.

This action began in the 44th Judicial District Court of Texas on February 14, 1966, when Appellee City of Dallas filed a civil action under authority of Dallas City Ordinance No. 11,284 (hereinafter referred to as the Dallas Classification Ordinance) against Interstate Circuit, Inc. (hereinafter referred to as Interstate), an exhibitor of motion pictures, to enjoin it from exhibiting the motion picture "VIVA MARIA" to persons under the age of 16 years within the city limits of the City of Dallas and to require all advertising of the picture to carry the classification of "not suitable for young persons." Over Appellee's objection, United Artists was permitted to intervene in such action and from that point forward it has been an active participant in all proceedings relating to the restricted exhibition of "VIVA MARIA."

Over the objections of United Artists and Interstate that the Dallas Classification Ordinance violated their respective rights of free expression under the First Amendment to the United States Constitution and deprived them, respectively, of due process under the Fourteenth Amendment thereto, trial was had to the Court without a jury on Appellee's prayer for a temporary injunction. The trial

court viewed "VIVA MARIA" in its entirety in the courtroom and granted Appellee a temporary injunction as prayed for.

This Court has jurisdiction of this appeal under 28 U.S.C. #1257(2), the courts below having rejected the timely claims of United Artists and Interstate that the Dallas Classification Ordinance is invalid because repugnant to the First and the Fourteenth Amendments to the Constitution of the United States. *Burstyn v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286; and, *Kingsley Int'l. Pictures Corp. v. Regents*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362.

FINALITY OF THE JUDGMENT FOR APPEAL PURPOSES

Even though this appeal is one from the granting of a temporary injunction, the questions now presented, as hereinafter stated, are as fundamental to the further conduct of the case as the questions presented to, and resolved by, this Court in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 13 L. Ed. 2d 199, 203, 85 S. Ct. 308; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, note 3, 93 L. Ed. 1628, 1633, 69 S. Ct. 1457; *Land v. Dollar*, 330 U.S. 731, 734, note 2, 91 L. Ed. 1209, 1214, 67 S. Ct. 1009; and, *United States v. General Motors Corp.*, 323 U.S. 373, 377, 89 L. Ed. 311, 318, 65 S. Ct. 357.

Perhaps the formality of a trial on the merits of Appellee's prayer for a permanent injunction is theoretically yet unavailable to Interstate and perhaps to United Artists, al-

though it is not an exhibitor of motion pictures and thus has no standing under the Dallas Classification Ordinance to challenge classification or proposed classification of any motion picture. Assuming such a trial to be available, what could be accomplished thereby? The trial court has held the Dallas Classification Ordinance valid as enacted, has viewed "VIVA MARIA," and has held it to be "not suitable for young persons" as that term is defined in said Ordinance. Any appeal from a permanent injunction judgment would of necessity be filed in the Court of Civil Appeals for the Fifth Supreme Judicial District. Two members of that three judge court have in this very case held the Dallas Classification Ordinance valid as enacted, have viewed "VIVA MARIA," have held it to be "not suitable for young persons" as that term is defined in said Ordinance, and, alternatively, have held it to be obscene under the tests of *Roth v. United States*, 344 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432; and, *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676. p. App. C-10, 11. While the granting of the temporary injunction may not, in the strict sense, be res judicata of the issues, under Texas decisions the law of the case has been finally established. *Furr's, Inc. v. United Specialty Advertising Company*, 385 S.W. 2d 456, 458-459 (Tex. Civ. App., wr. ref., n.r.e.); *Wilson v. Abilene Independent School District*, 204 S.W. 2d 407 (Tex. Civ. App., wr. ref., n.r.e.); *Baker v. Hill*, 35 S.W. 2d 779 (Tex. Civ. App., wr. dism.); and, *Hudspeth v. Guggenheim*, 12 S.W. 2d 238 (Tex. Civ. App., wr. dism.). As surely as was the situation

in *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434, trial of "VIVA MARIA" on the merits would be formal at most and would as surely lead to restricted exhibition of "VIVA MARIA" as "not suitable for young persons" as a trial of Mills would have led to his conviction.

There is no distinguishing difference between the present posture of the controlling issues in this case and those taken by this Court in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 97 L. Ed. 1094, 73 S. Ct. 749; and, *Local No. 438 v. Curry*, 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531. Especially where First and Fourteenth Amendment rights are jeopardized this Court should continue its long established policy of giving the requirement of judgment finality a practical rather than a technical construction. *Mills v. Alabama*, supra.

The Dallas Classification Ordinance provided an alternative to Interstate; it might have waived the temporary injunction hearing and consented to a trial on Appellee City's prayer for a permanent injunction. It chose not to do so, doubtless in the context of Rule 410, Texas Rules of Civil Procedure, which gives precedence in the Courts of Civil Appeals to appeals from temporary injunctions, but not from permanent injunctions. As this Court has heretofore recognized, in the area of motion pictures the exhibitor's limited interest in a particular feature, such as "VIVA MARIA," may too readily lead to unconstitutional restriction unless a prompt and speedy judicial review is assuredly available. *Freedman v. Maryland*, 380 U.S. 51, 59, 13 L. Ed. 2d 649, 655, 85 S. Ct. 734. Clearly the temporary injunction route promised, but did not necessarily deliver, the more prompt

review. Yet, regardless of its preference, United Artists, as Intervenor in the trial court, a party by sufferance rather than by right, had no alternative and no procedure available to it whereby it could insist that the trial as to "VIVA MARIA" result in a final, not temporary, judgment. As to United Artists, the present judgment is as final as it lay within its power to make it, and United Artists has no defenses, and will acquire none additional in the future, to the restricted exhibition of its motion picture "VIVA MARIA" within the city limits of Dallas, except the constitutional defenses now presented to this Court.

Since February, 1966, United Artists' property rights in "VIVA MARIA" have been partially taken from it; the audience which may view said motion picture has been restricted and limited. This will continue to be so unless the Dallas Classification Ordinance, as applied to this picture, is held by this Court to be unconstitutional. Is the withholding of a present right to exhibit (through Interstate or any other exhibitor in the city) significantly less damaging than an order directing the delivery of physical property? If not, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475, by analogy would dictate that this case is now ripe for review. United Artists' property rights in "VIVA MARIA" are of course diminishing with the passage of time and will doubtless be substantially extinguished by the time this case could again reach this Court after a formal retrial resulting in the granting of a permanent injunction.

LEGISLATIVE AND CONSTITUTIONAL PROVISIONS INVOLVED

Ordinance No. 11,284 enacted by the City council of the City of Dallas on November 22, 1965, is challenged herein as providing for restraints on the exhibition of the motion picture "VIVA MARIA," in the City of Dallas that are unconstitutional. Said Ordinance provides for the creation of a Motion Picture Classification Board which is to classify before their exhibition within the city limits of the City of Dallas all motion picture films as either "suitable for young persons" or "not suitable for young persons." The following portions of the Dallas Classification Ordinance are set out here, while the entire Ordinance appears in Appendix A, p. App. 1, infra:

> Section 46A-1.(d) "'Young person' means any person who has not attained his sixteenth birthday."
>
> Section 46A-1.(f) "'Not suitable for young persons' means:
>
> (1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or
>
> (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
>
> "A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on

the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons."

Section 46A-4.(a) "It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

* * *

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'."

Section 46A-7.(a) "Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County,

> Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance."

Section 46A-7.(c) "Failure of any exhibitor to file notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above."

United Artists urges that the restraints on the exhibition of "VIVA MARIA" by Interstate and other exhibitors in the City of Dallas, as provided by the Dallas Classification Ordinance and the action in this case by the courts below, are repugnant to the First Amendment to the United States Constitution and to Section 1 of the Fourteenth Amendment thereto.

QUESTIONS PRESENTED

I.

Whether the Dallas Classification Ordinance is in conflict with the First Amendment because by prior restraint it restricts the audience which may view a motion picture on grounds other than obscenity.

II.

Whether the Dallas Classification Ordinance is in conflict with the First and Fourteenth Amendments because of the vague, overbroad and indefinite standards for classi-

fication of a motion picture as "not suitable for young persons."

III.

Whether the Dallas Classification Ordinance contains adequate procedural safeguards, both as to exhibitors and distributors of motion pictures, to avoid conflict with the First and Fourteenth Amendments in view of the fact that it constitutes a prior restraint on exhibition of motion pictures.

IV.

Whether "VIVA MARIA," having been found by the lower court to have a "minimum of social value" to persons beneath the age of 16 years, may be restricted in its exhibition to an audience above the age of 16 years.

STATEMENT OF THE CASE

United Artists, as a national distributor of motion pictures, owns the exclusive domestic distribution rights to the feature motion picture "VIVA MARIA" which it licensed on January 17, 1966, to Interstate for exhibition in the Esquire Theatre, a commercial theatre within the city limits of the City of Dallas. Such agreement provided that United Artists should receive as its license fee 25% to 60% of the admission receipts of the engagement, depending on the box office gross. (Tr.[2] p. 9, Ex. A) Notwithstanding the obvious

[2] All references herein to "Tr.", "S.F.", "Brf.", "Mot. Reh.", and "Appl. Writ" are to the Transcript, Statement of Facts, Briefs, Motions for Rehearing, and Application for Writ of Error of United Artists, respectively, constituting a part of the record filed by Interstate in its companion appeal of this cause numbered 1109 and filed with the Clerk of this Court on March 3, 1967.

monetary interest of United Artists in any exhibition of "VIVA MARIA," Appellee's Motion Picture Classification Board established pursuant to City Ordinance 11,284 (p. App. A-1) classified "VIVA MARIA" as "not suitable for young persons" without any notice to, or opportunity to be heard by, United Artists on February 9, 1966. The effect of such classification was to exclude persons under the age of sixteen years from attending "VIVA MARIA" and to require all advertisements of it to carry the legend "not suitable for young persons." (p. App. A-8, 9, Secs. 46A-4(a) (2) and (5))

As permitted by the Dallas Classification Ordinance, Interstate filed on February 11, 1966, its notice of non-acceptance of the Board's action stating its intention to exhibit "VIVA MARIA" as suitable for a general audience; had such notice not been timely filed within the brief two day period allowed, the Board's classification would have become final without any judicial determination that "VIVA MARIA" was not protected expression under the First Amendment to the United States Constitution. (p. App. A-11, 14, Sec(s). 46A-7 (a) and (c))

Appellee filed an injunction proceeding against Interstate as the sole defendant on February 14, 1966, to require it to exclude from the "VIVA MARIA" audience persons under the age of sixteen years and to advertise the motion picture as "not suitable for young persons." (Tr. p. 1) As the grounds for such restrictions, Appellee alleged that "VIVA MARIA" portrayed:

> "* * * sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or en-

> courage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." (Tr. p. 4)

United Artists filed its Answer in Intervention on February 16, 1966 (Tr. p. 8), and, over the objection of Appellee (Tr. p. 35) that the trial court had no jurisdiction to determine the constitutional issues raised by said answer, was permitted to intervene. Thus, at the very inception of this case, United Artists timely asserted in said pleadings the repugnancy of the Dallas Classification Ordinance, particularly as applied to "VIVA MARIA," to the First and Fourteenth Amendments to the United States Constitution. Juries not being available in temporary injunction proceedings, the trial court viewed "VIVA MARIA" in its entirety in the courtroom, heard testimony and argument of counsel, concluded that,

> "* * * there are two or three features in this picture that look to me would be unsuitable to young people, * * * " (S.F. p. 109)

and granted on February 18, 1966, Appellee's prayer that exhibition and advertisement of "VIVA MARIA" be restricted as "not suitable for young persons". (p. App. B-1, 2)

United Artists thereupon gave timely notice of appeal to the Fifth Supreme Judicial District of Texas, sitting in Dallas, Texas, and timely filed on March 10, its Appellant's Brief. Therein, in Points of Error I, II, III, IV, VII and VIII, United Artists raised the constitutional issues now

presented to this Court (United Artists' Brf., pps. 3-9), again to no avail:

> "The two Appellants have filed separate briefs. Interstate Circuit, Inc., in its first six points on appeal, and United Artists Corporation in all of its ten points, assert that the ordinance and its application in this case are violative of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 8 and 19 of the Constitution of the State of Texas. We do not agree with Appellants." (p. App. C-3)

Two justices of said Court of Civil Appeals had viewed "VIVA MARIA" in the courtroom and had concluded that it was not a protected expression under the First Amendment to the United States Constitution. This conclusion was reached alternatively, that is, whether the motion picture were judged by the classification standards of the Dallas Classification Ordinance as enacted, or by obscenity standards enunciated by the United States Supreme Court, or by such standards "judged by the average young person." (p. App. C-10, 11)

Following denial of its Motion for Rehearing by said Court of Civil Appeals, United Artists timely filed an Application for Writ of Error in the Supreme Court of Texas on May 23, 1966. The questions presented herein were urged upon that court in Points of Error Two, Three and Four (United Artists' Appl. Writ, pps. 5-6), and said Application was refused, no reversible error, on July 27, 1966. (p. App. D-1) The Supreme Court of Texas so acted without itself viewing "VIVA MARIA." United Artists next filed a timely Motion for Rehearing, and then following the de-

cision of the United States Court of Appeals for the Fifth Circuit at New Orleans in *Interstate Circuit, Inc. v. City of Dallas*[3], 366 F. 2d 590, filed a Supplemental Motion for Rehearing to urge the Texas Supreme Court to consider anew the constitutionality of the Dallas Classification Ordinance in the light of said federal decision holding the classification standards (p. App. A-3, 4. Sec. 46A-1(f)) of said Ordinance invalid as enacted by the Dallas City Council and substituting in lieu thereof a totally new and different standard, "obscene when viewed by an audience of young persons," whereas the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas had held said classification standards valid as enacted without any obscenity limitation. All Motions for Rehearing were overruled by the Supreme Court of Texas on October 19, 1966. (p. App. D-2)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

That the federal constitutional questions presented herein are substantial and in need of resolution would seem to follow of necessity from the conflict between the judgment in this case and that of the Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, presently pending on Petitions for Certiorari before this Court under numbers 971 and 978. For example: May motion pictures to be exhibited in the city limits of the City of Dallas be constitutionally restricted to audiences

[3] Said federal suit was a declaratory judgment action, not involving a specific motion picture, in which the Dallas Classification Ordinance was held to be partially invalid and partially valid. It is the subject of two Petitions for Certiorari now pending before this Court, Nos. 971 and 978. United Artists was not a party to that suit, but did participate at the appellate level by means of amicus curiae brief and argument.

above the age of sixteen years based on the classification standards of the Dallas Classification Ordinance as enacted, in accordance with the state court judgment in this case, or may such restriction only be applied to motion pictures found to be "obscene when viewed by an audience of young persons," in accordance with the federal court judgment in *Interstate Circuit, Inc. v. City of Dallas*, supra, or, as United Artists urges, is the City of Dallas limited to restricting only the exhibition of those films which are "obscene," as that term has heretofore been defined by this Court?

I.

The Texas Court of Civil Appeals erred in holding that exhibition of "VIVA MARIA" may constitutionally be restricted on grounds other than obscenity.

Although recognizing the required elements of obscenity enunciated by this Court in *Roth v. United States*, 344 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 8 L. Ed 2d 639, 82 S. Ct. 1432; and, *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676, as so recently confirmed in *A Book v. Attorney General*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975, the Texas Court of Civil Appeals held them to be totally inapplicable to the Dallas Classification Ordinance:

> "It is my firm opinion that the constitutional guaranties of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as 'not suitable for young persons' is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States

Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.

"The ordinance under examination, in defining the phrase 'not suitable for young persons,' does not employ the words 'obscene' or 'obscenity.' The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted. * * * To say that a community is powerless to protect itself and its youth from such damage because of the constitutional safeguards of free speech is to my mind unconscionable and unacceptable." (Justice Bateman's opinion, concurred in by Chief Justice Dixon, p. App. C-16, 17)

The appealing notion that freedom of expression may be inhibited to a greater degree when directed at minors rather than adults has been rejected in *Police Comm'r of Baltimore v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727; *Katzev v. County of Los Angeles*, 52 Calif. 2d 630, 341 P. 2d 310; *William Goldman Theatres v. Dana*, 405 Pa. 83, 173 A. 2d 59; and, *Commonwealth v. Corey*, ... Mass. ...., 221 N.E. 2d 222. Thus, the decision in this case is in conflict with the decisions of the Supreme Courts of Maryland, California, Pennsylvania, and Massachusetts when considering enactments which attempt to restrict freedom of expression as to minors.

Nor, can it be said that "VIVA MARIA" is subject to restriction if the prurient-appeal requirement is adjusted to social realities, as in *Mishkin v. State of New York*, 383 U.S.

502, 16 L. Ed. 2d 56, 86 S. Ct. 958, because this record is completely devoid of any showing that "VIVA MARIA" was primarily designed or intended for persons under the age of sixteen years.

II.

The Texas Court of Civil Appeals erred in holding classification standards of the Dallas Ordinance not to be constitutionally infirm both because of vagueness and overbreadth.

In the instant case, even if we assume that motion pictures may constitutionally be restricted to certain age groups on grounds other than obscenity, the Dallas Classification Ordinance must nonetheless be invalid.

Section 46A-1.(f) containing the standards for classification of a motion picture as "not suitable for young persons" is copied in full text on pages 8-9, supra. A motion picture may be restricted if "in the judgment of the Board [it is] likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." The definitions of incitement or encouragement are in like manner tied to the judgment of the Board, as is the determination of whether there is "a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted." The language of Justice Clark in *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701, 3 L. Ed. 2d 1512, 1524, 79

S. Ct. 1362, is particularly appropriate to consideration of the Dallas Classification Ordinance standards:

> "* * * The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable, or profitable.' This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the belief of the individual censor rather than regulation by law."

Surely the Dallas standards of classification are no less vague than the standards stricken as unconstitutionally vague in *Gelling v. State*, 343 U.S. 960, 96 L. Ed. 1359, 72 S. Ct. 1002; *Burstyn v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286; *Commercial Pictures Corp. v. Regents*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286; and, *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870, 100 L. Ed. 770, 76 S. Ct. 117. The "precision of regulation" required in the area of First Amendment freedoms so recently emphasized in *Keyishian v. Board of Regents* (not yet officially reported) is totally lacking.

Moreover, there are so many disjunctives in the standards that exhibition of a motion picture may be restricted

for any one of 46 different grounds, all within the judgment of the Board. Standing alone, this apparent overbreadth should render the Dallas Classification Ordinance invalid. *Keyishian v. Board of Regents*, supra:

> "* * * Where statutes have an overbroad sweep, just as where vague 'the hazard of loss or substantial impairment of those precious rights may be critical, Dombrowski v. Pfister, supra, at 486, since those covered by the statute are bound to limit their behaviour to what is unquestionably safe."

Accord: *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L. Ed. 2d 231, 237, 81 S. Ct. 247; *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328; and, *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 28, 85 S. Ct. 1116.

III.

The Texas Court of Civil Appeals erred in holding that the Dallas Ordinance provides adequate procedural safeguards as to United Artists or any other distributor of motion pictures.

One may read and read again the Dallas Classification Ordinance without discovering any provision requiring the giving of any notice, or the affording of any hearing, to any distributor of motion pictures. "VIVA MARIA" was classified as "not suitable for young persons" by the Board as if United Artists did not exist, even though it was vitally interested in any audience restriction due to its participation in the box office receipts. This Court has held that persons whose legal rights would be determined by administrative or judicial proceedings are constitutionally entitled to notice thereof and an opportunity to be heard. Such notice, as has

been repeatedly emphasized, must be "reasonably calculated" to reach all interested parties. *Armstrong v. Manzo*, 380 U.S. 565, 14 L. Ed. 2d 62, 85 S. Ct. 1187; *Schroeder v. City of New York*, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279; and, *Mullane v. Central Hanover Bank*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652. It is no answer to such a requirement of due process to say, as did the Dallas Court of Civil Appeals:

> "* * * United Artists Corporation does not claim that it is an exhibitor of this or any other picture. It is a distributor and there is nothing in the Ordinance to prevent distribution of the film. The Ordinance has to do with the exhibition of the film to children, not its distribution. Besides, United Artists Corporation intervened in the lawsuit and was given full opportunity to be heard. It has not been harmed." (p. App. C-12)

Freedman v. Maryland, 380 U.S. 51, 58, 13 L. Ed. 2d 649, 654, 85 S. Ct. 734, requires that any prior restraint on free expression be accompanied by assuredly adequate procedural safeguards, including the requirement that,

> "* * * The burden of proving that the film is unprotected expression must rest upon the censor. * * *"

This is not the requirement of the Dallas Classification Ordinance, for once the Board has classified a motion picture the burden of challenging that classification is placed upon the exhibitor, not the Board. The exhibitor is required within two brief days of the action of the Board to file a notice of non-acceptance and any failure to timely file such a notice automatically results in the film being restricted fully to the same extent as though there had been a judicial de-

termination that the motion picture was not a protected expression. Although apparently patterned on the amended Maryland statute approved in *Trans-Lux v. Maryland*, Md. Ct. Apps., 216 A. 2d 235, it should be pointed out that such Maryland statute requires the Board of Censors to institute suit and obtain a judicial determination that a film is obscene before its exhibition may be restricted. Under the Dallas Classification Ordinance, the burden of going forward initially is placed upon the exhibitor; if he by oversight or otherwise fails to file the notice required there is restraint without judicial determination; and there is no adversary hearing or court determination before a motion picture is classified as "not suitable for young persons."

Moreover, the classification of "VIVA MARIA" as "not suitable for young persons" was required to be by mere majority vote of the Board, without any adversary hearing or determination that it was not protected expression under the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71, 9 L. Ed. 2d 584, 593, 83 S. Ct. 631; and, *A Quantity of Books v. Kansas*, 378 U.S. 205, 210, 212-13, 12 L. Ed. 2d 809, 812-13, 84 S. Ct. 1723, are direct authority that due process was denied United Artists.

IV.

The Texas Court of Civil Appeals erred in affirming the restriction of "Viva Maria" since it has some social value.

Citing *A Book v. Attorney General*, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975, Chief Justice Dixon wrote:

> "We hold that 'Viva Maria' has only a minimum of social value, if any at all, as to children under the age of sixteen years. And since it is permitted to be exhibited subject only to limited regulations, it is not constitutionally protected from the terms of the Ordinance. * * *" (p. App. C-12)

Clearly, the Court of Civil Appeals misunderstood the circumstances under which the book *Memoirs* might have been found obscene, having as it did only a minimum of social value. Justice Brennan was not saying, we respectfully submit, that because *Memoirs* had only a little social value, it might be regulated a little. Rather, he was saying that if a book, or movie, is exploited solely as appealing to prurient interests the one who so exploits it may not be sustained in contending that the work has social value rather than only the prurient appeal he urged it to have. This holding also conflicts with the requirement of *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, that only motion pictures "utterly without redeeming social importance" may be restricted.

The record before this Court, as before the Texas courts, is completely devoid of any evidence of the manner in which "VIVA MARIA" was advertised and of any evidence that it was exploited to appeal to the prurient interest of any one or any age group.

CONCLUSION

This appeal brings before this Court substantial federal questions of vital interest to municipalities and states, to

the publishing industry, to the motion picture industry and to the general public. This Court has not directly considered these federal questions and until they are resolved there will be continuing doubt, continuing restriction of expression, and continuing litigation. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,

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PROOF OF SERVICE

I, Dan McElroy, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of March, 1967, I served copies of the foregoing Jurisdictional Statement on the following parties by deposit-

ing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

   Mr. N. Alex Bickley, City Attorney
   Room 501, Municipal Building
   Dallas, Texas, 75201

2. To Appellant Interstate Circuit, Inc.:

   Mr. Grover Hartt
   Mr. Edwin Tobolowsky
   Tobolowsky, Hartt, Schlinger & Blalock
   Room 3525 Southland Center
   Dallas, Texas, 75201

/s/ DAN MCELROY

Dan McElroy,
1900 Mercantile Dallas Building
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An Attorney for Appellant
United Artists Corporation

APPENDIX A

Dallas City Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; Providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, is of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the purpose of classifying the movies to which such young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Section 46A-1 through 46A-11 inclusive, which shall read as follows:

"CHAPTER 46A"

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms

§ 46A-2 Establishment of Classification Board

§ 46A-3 Classification Procedure

§ 46A-4 Offenses

§ 46A-5 License

§ 46A-6 Revocation or suspension of license

§ 46A-7 Judicial Review

§ 46A-8 Public Nuisances

§ 46A-9 Injunctions

§ 46A-10 Exception to State Law

§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or